INDEX

Page

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Constitutional, Rule and Statutory Provisions 4

Statement of the Case 5

Reasons for Granting the Writ 6

Conclusion 23

Appendix A 25

Appendix B 36

Appendix C 42

Appendix D 43

Appendix E 44

Appendix F 45

Appendix G 49

Appendix H 56

Certificate of Service 24

Case Citations

Melancon v. McKeithen, 345 F. Supp. 1025 ..... 6, 14, 16

Norman v. State, 80 So.2d 858 13

Knighten v. American Auto Insurance Co., 121 So.2d 344 13

Guedry v. Ford, 431 F.2d 660 22

Koen v. Long, 302 F. Supp. 1383 22

Basista v. Weir, 340 F.2d 74 22

Jones v. Wittberg, 330 F. Supp. 707 22

Webb v. Lake Mills, 340 F.2d 74 22

Carter v. Gallagher, 452 F.2d 315 23

Law Review Citations

22 La. L.Rev. 604, 614 14

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. _____

HARRISON J. CHERAMIE, JR.,

Petitioner

versus

HONORABLE BEN C. TUCKER, ET AL

PETITION FOR WRIT OF CERTIORARI TO REVIEW THE DECISIONS OF THE UNITED STATES FIFTH CIRCUIT COURT OF APPEALS AND REQUEST FOR SUMMARY REVERSAL

The petitioner, Harrison J. Cheramie, Jr., prays that a writ of certiorari issue to review and to request summary reversal of the judgment of the United States Fifth Circuit Court of Appeals rendered in these proceedings on 2 May 1974. Rehearing was denied on 6 June 1974.

OPINIONS BELOW

The opinion of the Nineteenth Judicial District Court for the State of Louisiana is unreported but is found in Appendix A, infra, pp. 25 - 35.

The opinion of the First Circuit Court of Appeals for the State of Louisiana is reported in 263 So.2d 487, and is found in Appendix B, infra, pp. 36 - 41.

Rehearing was denied without an opinion, Appendix C, infra, p. 42.

Writs were refused by the Louisiana Supreme Court in 266 So.2d 431, Appendix D, infra, p. 43.

Writs were refused by the United States Supreme Court, 410 U.S. 931, Appendix E, infra, p. 44.

The unreported opinion of the United States District Court for the Middle District of Louisiana appears in Appendix F, infra, pp. 45 - 48.

The reported opinion of the United States Fifth Circuit Court of Appeals, 493 F.2d 586, appears in Appendix G, infra, pp. 49 - 55.

There was no opinion rendered in the yet unreported Fifth Circuit's denial of rehearing, Appendix H, p. 56.

JURISDICTION

The judgment of the United States Fifth Circuit Court of Appeals was entered on 2 May 1974. Rehearing was denied on 6 June 1974. See Appendix G and H. This petition for certiorari was filed less than 90 days from the two aforesaid dates. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). Jurisdiction of the lower federal courts is conferred by 28 U.S.C. 1343(3) and 42 U.S.C. 1983.

QUESTIONS PRESENTED

1. Was the action taken by Judges Tucker, Blanche and Landry in contravention of, in derogation of and in deprivation of Mr. Cheramie's rights and privileges as secured by the Fourteenth Amendment to the Constitution of the United States of America and by 42 USC 1983 because Mr. Cheramie was not allowed to try his case before the "ultimate trier of

fact" since Judges Tucker, Blanche and Landry **assumed the position** of the Trier of Fact even though they never saw or heard the witnesses, only read about the trial, did not have confrontation and demeanor evidence, and were not in a position to determine the **true** facts?

2. Was Mr. Cheramie denied Due Process of Law, the Equal Protection of the law and the Right to a Fair Trial by being denied the right to confront witnesses before **the** "Trier of Fact," Judges Tucker, Blanche and Landry?

3. Were Mr. Cheramie's rights and privileges under the Constitution of the United States of America and his property taken away from him **after his trial** in the district court by Judges Tucker, Blanche and Landry in making an independent finding of fact and by reversing his judgment on the facts simply because they disagreed with the findings of fact, which were not manifestly erroneous, and by substituting their interpretations of the facts for the true facts found by the trial court who saw and heard the witnesses?

4. Was the action taken by Judges Tucker, Blanche, and Landry inconsistent and contrary to the Fourteenth Amendment to the Constitution of the United States of America and 42 USC 1983: (a) by reversing and rendering on the facts alone without another trial which violated Mr. Cheramie's right to a fair trial under the Due Process clause of the Fourteenth Amendment of the United States constitution, (b) by reversing and **rendering** on the facts alone without another trial which violated Mr. Cheramie's right to a fair trial under the Equal Protection of the Laws Clause of the Fourteenth Amendment of the United States Constitution and (c) by reversing and **rendering** on the facts alone without another trial which took away Mr. Cheramie's property without Due Process of Law as prohibited by the Fourteenth Amendment to the United States Constitution?

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS INVOLVED

Constitution of the United States, Amendment 14, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Title 28, United States Code, Section 1343(3):

> "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> * * * * *
>
> "(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;"
>
> * * * * *

Title 42, United States Code, Section 1983:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Con-

stitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Article 7, Section 10, Louisiana State Constitution:

> "In all civil and probate cases where the Supreme Court is given appellate jurisdiction, the appeal shall be both upon the law and the facts."

Article 7, Section 29, Louisiana State Constitution:

> "The Courts of Appeal, except as otherwise provided in this Constitution, shall have appellate jurisdiction only, which jurisdiction shall extend to all cases, civil and probate, of which the Civil District Court for the Parish of Orleans, or the District Courts throughout the State, have exclusive original jurisdiction, regardless of the amount involved, or concurrent jurisdiction exceeding one hundred dollars, exclusive of interest, and of which the Supreme Court is not given jurisdiction, except as otherwise provided in this Constitution, and all appeals shall be both upon the law and the facts."

STATEMENT OF FACTS

Mr. Cheramie has been quadriplegic since 4 March 1967 and is completely helpless. He filed suit against the State of Louisiana, through the Department of Highways, in the Nineteenth Judicial District Court, Parish of East Baton Rouge, State of Louisiana for its fault in being rendered quadriplegic. After trial he obtained a judgment in his favor against the State of Louisiana (Appendix A, infra, p. 25). This judgment was appealed to the First Circuit Court of Appeals of the State of Louisiana, composed of Judges Tucker, Blanche and Landry. Judges Tucker, Blanche and Landry reversed the trial court's judgment on the credibility of one witness because they disagreed with the facts as found by the trial

judge and **rendered** judgment against Mr. Cheramie (Appendix B, infra, p. 36). Judges Tucker, Blanche and Landry never saw or heard a witness. Judges Tucker, Blanche and Landry found no error of law. Judges Tucker, Blanche and Landry refused rehearing (Appendix C, infra, p. 42). The Louisiana Supreme Court refused writs **based on the facts found by the Court of Appeal** (Appendix D, infra, p. 43). The U.S. Supreme Court declined to grant writs (Appendix E, infra, p. 44).

Plaintiff filed suit against Judges Tucker, Blanche and Landry to bring up the federal constitution issue of right to fair trial, due process, and equal protection of the laws.

The federal district court dismissed plaintiff's action based on the *Melancon v. McKeithen*, 345 F. Supp. 1025, decision and judicial immunity (Appendix F, infra, p. 45).

Plaintiff then appealed to the Fifth Circuit Court of Appeals which denied relief to Mr. Cheramie (Appendix G, infra, p. 49). The court held that plaintiff had a chance to fully litigate the question of his denial of his constitutional rights by the First Circuit Court of Appeal of Louisiana and that his case had already been heard and decided by other courts. Rehearing was denied by the Fifth Circuit (Appendix H. infra, p. 56).

The facts are not in dispute. The holdings of the lower courts are manifestly unjust and in violation of plaintiff's constitutional rights.

REASONS FOR GRANTING THE WRIT

Petitioner submits that the Fifth Circuit Court of Appeals has decided federal questions of great substance not heretofore specifically determined by this Court.

Plaintiff, Harrison J. Cheramie, Jr., swerved his vehicle to avoid an intersectional collision with Ronald Lloyd; his vehicle overturned and he was rendered quadriplegic. Plaintiff's lane of traffic had the right of way and the intersecting road that Lloyd was on was supposed to be controlled by a stop sign and flashing red light. Plaintiff sued the State of Louisiana through its Department of Highways because, as was proven at trial, the light was not working and the stop sign, placed behind two poles, was obscured from vision. The trial judge found that Lloyd had proceeded into the intersection because he was not warned to stop for traffic in plaintiff's lane, and that the defendant was responsible for the lack of warning. The trial judge awarded plaintiff $1,211,453.88 plus interest and costs. The First Circuit Court of Appeal composed of Judges Tucker, Blanche and Landry reversed on the facts. The Louisiana Supreme Court refused Writs and no error of law based on the facts as found by the Court of Appeal.

Judges Tucker, Blanche and Landry concluded that the crucial factual question was whether Lloyd actually saw the stop sign. They felt that he did see the sign and merely disobeyed it. Judges Tucker, Blanche and Landry thereby expressly overruled the crucial factual finding by the trial court, that Lloyd did not see the sign. It is apparent that this one "crucial issue," as deemed by the judges, under the trial court's finding makes the defendant liable, and under Judges Tucker, Blanche and Landry's finding makes the defendant not liable.

The trial court also found that the flashing red light, by itself or in combination with the stop sign, would have provided Lloyd adequate warning to stop and therefore, the State had been negligent for not maintaining it for the previous two years. Judges Tucker, Blanche and Landry expressly refused to place significance on this factual finding and the Louisiana

Supreme Court refused to grant plaintiff a writ of certiorari based on Judges Tucker, Blanche and Landry's substitution of **the facts.**

Mr. Cheramie contends that Judges Tucker, Blanche and Landry, in substituting their findings of fact in this instance for the trial court's findings of fact, denied him due process and the equal protection of the laws under the Fourteenth Amendment of the United States Constitution. Judges Tucker, Blanche and Landry took away his judgment without finding any error because they chose to believe half of the testimony of one witness even without seeing or hearing that witness testify. Mr. Cheramie also contends that the United States District Court and the Fifth Circuit Court of Appeals denied him due process and equal protection of the laws under the Fourteenth Amendment of the United States Constitution in denying him relief by, in effect, confirming the actions of Judges Tucker, Blanche and Landry.

To grant a trial to decide a case of controversy is to determine its outcome according to due process of law and fairness. A trial involves a factual analysis by direct and cross examinations of witnesses to determine truth and the application of the proper law. This process of legal determination allows the fact finder to best decide a witness' credibility and to be able to determine the proper weight to be applied to the witnss' testimony. This method of fact finding is due process of law. To deny the parties involved in the trial this method of fact finding is to deny them due process of law in violation of the Fourteenth Amendment. Judges Tucker, Blanche and Landry took this process of fact finding away from the trial judge, and as a result, negated the entire effect and purpose of direct and cross examinations of witnesses and the basic purpose of a trial itself. Nowhere in their opinion did Judges Tucker, Blanche and Lnadry mention any error of law. In fact, the Louisiana Supreme Court denied writs based on the NEW

FACTS as found by Judges Tucker, Blanche and Landry because the Louisiana Supreme Court also found "no error of law."

Judges Tucker, Blanche and Landry simply substituted their feelings for that of the trial court with reference to veracity and truthfulness of one witness. They simply disagreed with the findings of the trial court and changed the findings to suit themselves without ever remanding the case for another trial. They, in effect, became the trier of fact and Mr. Cheramie did not have a chance to fully litigate his case before the trier of fact. Even the Supreme Court of Louisiana cannot substitute its findings of fact for the trial court in a criminal case in Louisiana.

Under the federal constitutional right to a fair trial, Judges Tucker, Blanche and Landry do **not** have the power to review the facts because the trial court is the only court that has listened to witnesses, watched their manner of talk, observed their coolness or nervousness on the stand, seen how they react to various questions or other witnesses, and how they reacted if impeached and discredited during cross examination. In fact, Ronald Lloyd was proven to have falsely testified on two occasions in the trial, which may have accounted for the trial judge's disbelief in his crucial testimony that he saw the stop sign. Judges Tucker, Blanche and Landry chose to believe only part of Ronald Lloyd's transcribed testimony without having seen or heard him or experienced the mental impact of seeing him impeached on cross examination. Judges Tucker, Blanche and Landry are constitutionally bound to accept the factual findings of the trier of fact and decide whether an error of law or procedural error has been committed and whether the matter should be retried: they cannot summarily reverse and render, because when they do, they are taking away a litigant's right to try his case with con-

frontation of witnesses and demeanor evidence before (in the presence of) the trier of fact.

The written word is not so revealing with reference to truth as the spoken word. Judges of the Courts of Appeal in Louisiana at times have voiced the opinion that the written record is more revealing of the truth and the credibility of witnesses than actually looking at a witness. Louisiana Court of Appeal judges have been heard to say that some people can lie so well that they look like they are telling the truth. We know this is true. This is the reason, or one of the reasons, why the polygraph test is not admitted into evidence.

If a person does not believe that when he tells a lie that it is wrong, he becomes so accustomed to lying that it does not upset him to lie. He can then lie his way through a polygraph test. The polygraph test will have a false reading because it will show that he is telling the truth.

Yet, with all of this, these same judges, we submit, when it comes down to something really important to them would want to face the person who is making the allegation to determine truthfulness. If a person wants to find out the truth of something really important to him, he would want to watch the person he is interrogating. He would want to see how that person reacts to the questions, not necessarily what the answers are. Perhaps the reactions to the questions might tell the truth more so than the actual answers. That is why the written word of a witness is not nearly as good as the confrontation of that same person.

If a parent wanted to find out or question his teenager about some activities, surely the parent would not write a letter to the teenager and ask him to answer the letter or write down an account of his activities, nor would the parent call him on the phone and ask him to give an account of his

activities. The parent would confront him at a time perhaps when he thinks he will not be confronted, then the parents would ask him questions and watch his reactions. From his reactions to the questions, the parent would make up his mind whether or not his child is telling the truth.

If, for instance, a wife were to think that her husband was having an affair with her best friend, surely she would not call him at the office and ask him if he is having an affair with Mary, nor would she drop him a note and ask him to write down his responses as to whether or not he is having an affair with Mary. She would wait until an opportune time when he has had a good day at the office and he has come home and has had his best supper and has sat down and is about ready to watch his favorite TV show. She waits on him hand and foot - he thinks that nothing in the world is wrong and everything is right and beautiful. All of a sudden while he is in this frame of mind she turns to him and stares him in the eyes and asks him the direct question, "Are you having an affair with Mary?" She knows that when she asks this question that his answer in all probability, regardless of the truth of the answer, will be "No", but she wants to watch his reactions - she wants to see if he drops his drink, if he scratches, if the blood drains from his face, if he lights his cigarette, if his eyes dilate, if he mumbles, if the tone of his voice is not as it normally is, if he coughs, if he screams, if he yells, if he cannot look back at her, if he can look at her, if he is upset by it or not upset by it, if he comes back with a cutting question to her in answer to that question or he casually answers the question, or if he remains silent, ET CETERA, et cetera, etc. There are a thousand and one things she will look at and she is going to make the decision as to veracity based on his reactions - probably a very small part of the decision will be based on the answer given. If this was transcribed, the person reading the record might actually come to a completely differ-

ent conclusion. The record would show that "he said no" and therefore he was not running around with Mary. If the wife thought otherwise, then she was "manifestly erroneous."

Who can be sure that a witness is telling the truth? Can Judges Tucker, Blanche and Landry be that sure that Ronald Lloyd really saw the stop sign that he says he saw? Can Judges Tucker, Blanche and Landry be so sure that he really did not see the stop sign in view of the three eye witnesses to the contrary who witnessed his actions? If so, then why didn't he stop? He was unfamiliar with this area.

Can Judges Tucker, Blanche and Landry be so sure that they can say that the trial court, which saw and observed Ronald Lloyd and observed these other witnesses, was so far out in left field that it was guilty of committing manifest error for disbelieving Ronald Lloyd? Especially when Lloyd was impeached twice. Even with a proper finding of manifest error, the case must be **remanded** for another trial and not just **Reversed** and **Rendered.** To just **Reverse and Render** takes away a litigant's right of due process and the right to try his case before the trier of fact. The Court of Appeals, one step further removed from actual events can do no more than second guess the trial court. Justice is not a game of chance.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Had Mr. Cheramie's accident occurred within the jurisdiction of any of the district courts of the other 49 states or

within the jurisdiction of the federal district court of any of the 50 United States, the judgment rendered by the trial court would not be subject to being reversed and rendered simply because of the interpretation or misinterpretation of the transcribed facts by judges who neither saw nor heard the witnesses testify, as was done in this case. In the federal system the federal appellate court must find that the ruling of the trial court was clearly erroneous - and then the case is **retried.** The same is generally true in the other 49 states. Louisiana is the only jurisdiction in the civilized world where judges review the facts and substitute their findings of fact and render a final judgment without a remand for a trial free of error. This practice, as applied to Mr. Cheramie, is **not** in accord with the United States Constitution. Just because the "authority" for such a practice is in the Louisiana Constitution (Article 7, Section 29) **does not** necessarily make it permissible under the United States Constitution.

Although Louisiana Courts of Appeal have the prerogative of reversing a Trial Court on the cold record of facts, this exercise of power is subject to the jurisprudential requirement that factual findings of a trial court or the verdict of a jury should be disturbed only when they are manifestly erroneous. *Norman v. State*, 69 So.2d 12 (La.App. 1953), reversed 80 So.2d 858; *Knighten v. Am. Auto Insurance Company*, 121 So.2d 344 (La. App. 1960).

Louisiana Supreme Court Justice Albert Tate has stated:

> "that appellate courts must adhere to the settled jurisprudential rule to which at least lip-service has been paid by a century and a half of Louisiana precedents: That a trial court's factual determinations should be accepted on appellate review, in the absence of manifest error. And we must do so not only because as a practical matter **the trial judge is in a better position than is his appellate brethren to evalu-**

> **ate the credibility of witnesses.** We must do so also because the proper and efficient operation of our judicial system allots factual determinations **primarily** to the trial judge and only **secondarily** to the appellate court, and because the public interest in the swift and authoritative settlement of disputes at law requires it." (Emphasis supplied.) Tate, Manifest Error-Further Observations on Appellate Review of Facts in Louisiana Civil Cases, *22 La. Law Review 605, 614 (1962).*

It was precisely the existence of the "manifest error" rule that convinced the Court in *Melancon v. McKeithen,* 345 F.Supp. 1025, to uphold the constitutionality of Louisiana's scheme of appellate review of facts. 345 F.Supp. 1025, at 1047. But surely the Melancon court did not intend to preclude subsequent collateral attacks on Louisiana appellate court decisions, based on federal due process and federal civil rights grounds, when those decisions pay just "lip-service" to the constitutionally justifying principle of "manifest error."

The *Melancon v. McKeithen* case is not controlling in any event. The Melancon cases were 7th Amendment cases attacking Louisiana's appellate review of fact **as applied to jury trials.** Mr. Cheramie's case is not directly attacking the system and surely not as applied to jury trials. Mr. Cheramie is saying that in his case **he** was deprived of the basic American way of trial disputes, and of Due Process of law and Equal Protection under the 14th Amendment of the United States Constitution. Mr. Cheramie complains that Judges Tucker, Blanche and Landry used state law to deprive him of his rights in that they **assumed the role** of the trier of fact — actually trying the case over on paper without confrontation evidence. Judges Tucker, Blanche and Landry reversed and rendered based on the credibility of a single witness that they neither saw nor heard. Mr. Cheramie believes that if a new trial is going to be held and if evidence is to be re-evaluated and

decided, that he himself ought to be present with all of the witnesses subject to confrontation and that a full trial should take place.

The first sentence of the Melancon decision, 345 F.Supp. 1025, shows how that case differs from Mr. Cheramie's case in that Melancon was based on the 7th Amendment **through** the 14th:

> "The plaintiffs in these consolidated cases (See Appendix A) invite this Court to hold that the Seventh Amendment of the United States Constitution[1] applies to civil actions in Louisiana courts through the Due Process Clause of the Fourteenth Amendment."

The Melancon cases did not directly deal with the concept of **Due Process** that Mr. Cheramie complains of here. The decision discusses the jurisdictional issue and the need for a three judge court, then the history of civil jury trials, as followed by a discussion of "selective incorporation" of Constitutional amendments. The discussion was summed up thus:

> "We conclude from our review of the law that the Supreme Court has examined each claim to a Bill of Rights guarantee on its own merits. The existence of the Seventh Amendment is evidence that in 1791 the jury in suits at common law, but not in other suits, was essential to civil process in the federal courts. But the adoption of the Fourteenth Amendment did not mechanistically make the Seventh Amendment applicable to the States." (344 F.Supp. 1025, 1040)

However, it is interesting to note that this Court, referring to the Seventh Amendment stated in *Pernell v. Southall Realty*, 94 S.Ct. 1723, at 1727:

> "Like other provisions of the Bill of Rights, it

> is fully applicable to court established by Congress in the 'District of Columbia'."

Next the *Melancon* discusses the "erosion" of the civil jury system, followed by a section on re-examination of facts found by a jury. The discussion still centered around the 7th Amendment.

> "[7] A. This leads us to consider whether jury trial without re-examination of facts—the principle embodied in the second clause of the Seventh Amendment—is so fundamental to the American scheme of justice as to constitute a necessary ingredient of due process. We hold, in view of the ever-changing nature of the judge-jury division of functions, that the principle embodied in the second clause of the Seventh Amendment is not required of the States by due process." (345 F.Supp. 1025, 1045)

Still we find no holding or discussion that would apply to the present case. The closest the court comes to the present issue is to state Louisiana Manifest Error Rule:

> "The law of this state is unique. Nevertheless its lawmakers, legislative and judicial, have managed too work out compromise procedures compatible with Louisiana's civilian heritage and with the Anglo-American concept of due process. There is appellate review on the facts as well as on the law, but it is subject to the requirement that factual findings of a trial court or the verdict of a jury should be disturbed only when they are manifestly erroneous. (345 F. Supp. 1025, 1047)"

It is important to note that the court felt that Louisiana's Manifest Error Rule is what gives Louisiana citizens Due Process of law. Mr. Cheramie's complaint that the misuse of that system is not Due Process seems to be consistent with the court's statement.

Had Mr. Cheramie been a citizen of any state except Louisiana, he would have been entitled to a trial under the diversity jurisdiction of the federal district courts in Louisiana on this cause of action. The judgment rendered in the trial court, had it been a federal district court, would not be subject to reversal on the facts alone, unless the appellate court found that it was clearly erroneous. Even in that event, if reversed because of error, Mr. Cheramie would still be entitled to a new trial free of error. If his case were tried in any of the other 49 states his judgment would not be subject to reversal on findings of fact alone. Therefore, for Judges Tucker, Blanche and Landry to render such absolute and summary reversal of Mr. Cheramie's judgment on facts alone, is to deny Mr. Cheramie the basic right of the equal protection of the laws available in all other states of the Union, both in state and federal courts, and, indeed, even in the United States District Courts in Louisiana.

In the courts of all other states of the Union and the federal courts, litigants are entitled to a fair trial in which they can confront and cross examine and impeach witnesses in the presence of the trier of fact. To allow Judges Tucker, Blanche and Landry to substitute their findings of fact for the trial court's findings of fact and to reverse on facts alone from the transcript, like they did in this case, amounted to a trial **de novo** and **in absentia** where Mr. Cheramie was not allowed to confront or even cross examine the witnesses in the presence of the "trier of fact" - Judges Tucker, Blanche and Landry.

Had Mr. Cheramie's case been subjected to due process appeal he would not have had to suffer the indignity, expense, and lack of finality in trying his case once without error only to have it retried behind closed doors on the record alone and reversed and ended. Any judgment rendered by any other court of the land, state or federal, and Louisiana federal

courts, would not be subject to such ultimate and summary reversal on an appellate court's findings of fact alone unless it was "clearly erroneous", and even then, HE WOULD BE GRANTED A GENUINE AND FAIR NEW TRIAL. Mr. Cheramie, therefore, was denied a FAIR TRIAL by Judges Tucker, Blanche and Landry since the appeal that took away his judgment amounted to a "trial" which was conducted on paper, without hearing of evidence, cross examination or confrontation of witnesses and was really no trial at all only the reading of a transcript.

Had Mr. Cheramie been a citizen of any state except Louisiana he would have been able to still try his case in Louisiana, but in a federal court with the same Louisiana substantive law applying, and no higher court in this land could reverse and render on the facts or **substitute** its findings of fact for the trial court's findings of fact. This is discriminatory, does not constitute equal protection of the laws, and has been enforced by state action.

Mr. Cheramie submits that the actions of Judges Tucker, Blanche and Landry as set forth were discriminatory, denied him due process of law, denied him the equal protection of the laws, and denied him of his American right to a fair trial. Mr. Cheramie submits that due process allows every citizen of the United States to litigate his complaints in a court of law and have them fairly decided at all levels of the process. Mr. Cheramie submits that the American way of trying cases is sacred.

What is found upon trial cannot be changed without a finding of error and without a new trial free of error.

Mr. Cheramie's judgment, obtained by him through due process, was taken away from him without due process by the actions of Judges Tucker, Blanche and Landry and affirmed by the Fifth Circuit Court of Appeals.

Mr. Cheramie's case for the denial of his rights of Due Process, Equal Protection, and Right to a Fair Trial and Appeal, under the 14th Amendment to the United States Constitution by the misapplication of Louisiana law by defendants has never been heard by any court as urged by the Fifth Circuit. Since there is a cause of action for one who has been deprived of his constitutional rights by another person and since the law is very clear that there must be a hearing granted to that person who has been or may be deprived of rights; and since judges are also persons when sued individually for equitable relief and it is possible for judges as persons to deprive another of his rights, then the law says that this issue must be litigated. This has not been done.

The reason Mr. Cheramie has been denied his rights to a full and fair hearing is due to the peculiarity of the Louisiana system of appeals. In all other states and in the federal courts of all states a party who has won on the trial level, but is reversed on appeal, is remanded for a new trial if the appellate court finds clear error. The issue of the appellate court's finding can either go to that state's Supreme Court and then to the United States Supreme Court or to a new trial. These Supreme Courts may each refuse writs in effect because a new trial is the best method to reach a true determination of the appellate court's reversal. Mr. Cheramie, if he were in any other state or in the federal courts of this state, would have been given a chance to have a due process hearing of the same issues with live witnesses in a new trial exactly like the original trial that was reversed. This allows the party who has been reversed to receive a full and fair hearing of the appellate court's reversal by trying the whole case anew with the trial court inevitably emphasizing the reversing court's reasons. This method employed by every state except Louisiana and by the federal courts grants, in effect, a full and fair hearing of the issue of reversal as of right once the case is reversed and

remanded. This hearing is not discretionary as is the application for writs to Supreme Courts.

Because Louisiana appellate courts have the power to review fact finding of lower courts and to make a reversal without a remand and in effect decide the case anew, the state has short-cut the system. There is no review of right of this appellate court's decision and since the Louisiana and United States Supreme Courts denied writs there has been **no full and fair hearing** of the defendant-appellees' decision, as Mr. Cheramie has not been allowed any voice or any argument before the Supreme Courts and has not been heard except by application for writs to those courts on the issue now presented to this court.

There has been no collateral estoppel because no court has previously determined the issue by a full and fair hearing, as there has not been a judicial determination of the issue of the defendants' unconstitutional reversal of the trial court's finding.

The Fifth Circuit's reasoning that Mr. Cheramie has had a chance to litigate the question of defendant-appellees' reversal would be accurate if Mr. Cheramie resided in another state or was on the federal level originally. However, since no new trial has been granted and since no court has heard Mr. Cheramie's complaint, this argument must fall.

The defendants acted contrary to Louisiana law because no manifest error exists in the trial court's decision. Since there does exist contradictory evidence that can be taken two ways, the trial court who observes the witnesses is best able to judge which to believe. It is only a decision that is blatantly against reasonable discretion that is reversable in Louisiana. Louisiana's manifest error rule meets the minimum standards of the due process requirements of the 14th Amendment of

the United States Constitution. When the defendants reversed and the Fifth Circuit confirmed this action without the presence of a blatant manifest error in judicial reasoning they violated Mr. Cheramie's constitutional rights and Mr. Cheramie must be heard.

Mr. Cheramie is entitled to, deserves, and possesses rights guaranteed to him by the Constitution of the United States of America to a full and fair hearing. Since he has been denied his constitutional rights and especially when the courts themselves have dispossessed him of these rights, then there is a more compelling reason why this court should grant certiorari and go into the federal constitutional question presented.

This Court is of greater dignity than the three judge panel that decided the Melancon cases and it therefore has every right to make a just decision based on the particular case before it, just as the Melancon court did. It is fundamental that a federal court will do justice for a citizen of the United States rather than follow rulings of other cases that may work an injustice in the case before it.

Defendants cannot claim that Mr. Cheramie has been granted **Due Process** and **Equal Protection** solely because he has had the full spectrum of appellate review, since every court following that of Judges Tucker, Blanche and Landry acted or did not act on the "new facts" as found by Judges Tucker, Blanche and Landry. The remainder of the judicial process was a routine denial on rehearing and writs, **based on the new facts** as found by Judges Tucker, Blanche and Landry. All that need be done is to correct the actions of Judges Tucker, Blanche and Landry which denied Mr. Cheramie his rights, by setting aside their unconstitutional judgment and the judgment of the Fifth Circuit.

Defendants cannot claim that the United States Supreme Court has been presented the same issue and has ruled on it

by denying writs. One of the most basic rules of federal practice is that denial of writs by the United States Supreme Court means nothing one way or the other. The United States Supreme Court declined to grant writs to Mr. Cheramie and this cannot be construed as an approval of the actions of Judges Tucker, Blanche and Landry.

Mr. Cheramie is not suing Judges Tucker, Blanche and Landry for money damages. Judges are immune from suit for money damages but are not immune to 1983 Civil Rights Actions based on actions that cause other damages done under color of office. See *Guedry v. Ford*, 431 F.2d 660 and *Koen v. Long*, 302 F. Supp. 1383.

The law under 42 USC 1983 as well as the case of *Basista v. Weir*, as urged by the defendants, 340 F.2d 74 is incorrect. That case does **not** stand for a rule that 1983 contemplates as action for money damages against the **offending party.** Damages are needed in any 1983 case, but it does not have to be money damages as illustrated in *Jones v. Wittberg*, 330 F. Supp. 707 where prisoners were denied proper medical care and *Webb v. Lake Mills*, 344 F. Supp. 791, where a teacher was improperly fired. Mr. Cheramie must have suffered damage — that is what the *Basista* case, 340 F.2d 74, 85 was saying, but it did not say that a plaintiff must sue the offender for **money.** He need only be **damaged** by him.

Mr. Cheramie suffered damages when he lost his judgment, and it was through the unconstitutional actions of Judges Tucker, Blanche and Landry and the affirmance of that decision by the Federal District Court and the Fifth Circuit.

Finally, plaintiff points out that this court can give any relief it deems just, whether it has a name or not, as long as it grants Mr. Cheramie **Due Process** and **Equal Protection** as guaranteed under the Constitution of the United States.

The United States Supreme Court did refuse writs to petitioner. See Appendix E. However, under the principles espoused by this very Court in *Gondeck v. Pan American World Airways, Inc.*, 86 Sp. Ct. 153, 154 and *United States v. Ohio Power Company*, 77 Sp. Ct. 652, 653, justice commands that petitioner be granted a full and fair hearing before the highest court in the land. In these cases the Court, after initially denying writs and a rehearing to petitioners, stated that:

> ". . . the interest in finality of litigation must yield where the interests of justice would make unfair the strict application of our rules."

42 USC 1983 allows courts to grant equitable relief, and they therefore have a broad power to fashion a remedy that is needed. *Carter v. Gallagher*, 452 F.2d 315.

Plaintiff requests that the judgment of Judges Tucker, Blanche and Landry and the Fifth Circuit be held unconstitutional.

CONCLUSION

For these reasons a writ of certiorari should issue to review and reverse the judgment of the Fifth Circuit of Appeals of the United States.

Respectfully submitted:

BY: _____

ARTHUR COBB, Trial Attorney
Suite 3N
5551 Corporate Blvd.
Baton Rouge, Louisiana 70808
927-3956 Area Code 504

CERTIFICATE OF SERVICE

I certify that two copies of this application for writs has been mailed to William J. Guste, Jr., Attorney General of the State of Louisiana, Robert Funderburk, special counsel, and Charles William Roberts on 23 July 1974.

ARTHUR COBB

APPENDIX A

NOTICE OF ORDER OF JUDGMENT IN COMPLIANCE WITH LOUISIANA REVISED STATUTES OF 1950 13:3346

Re: HARRISON J. CHERAMIE, JR. No. 130,070 Civil Docket "C"

VS

STATE OF LOUISIANA

19th JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

To Messrs: Arthur Cobb and Charles Wm. Roberts, Attorneys

GREETING:

You are hereby notified that a decision was rendered and spread on the minutes of Civil Docket "C" on the 7th day of December, 19 71 in the above entitled and numbered cause, and the following is a true copy of the entry of said decision:

For written reasons this day assigned, judgment is rendered in favor of plaintiff, Harrison J. Cheramie, Jr., and against the defendant, State of Louisiana, in the sum of $361,453.88 for total special damages and the sum of $850,000.00 for pain and suffering and permanent disability, past, present and future. Judgment will be signed accordingly.

( ) Oral decision

(X) Written decision, a copy of which is enclosed herewith.

filed

Thus done, signed and mailed/at Baton Rouge, Louisiana,

on this 7th day of December 19 71

Camille Romano
Deputy Clerk of Court

HARRISON J. CHERAMIE, JR.	:	NUMBER 130,070 DIVISION "C"
	:	
	:	19TH JUDICIAL DISTRICT COURT
VERSUS	:	
	:	PARISH OF EAST BATON ROUGE
	:	
STATE OF LOUISIANA	:	STATE OF LOUISIANA

WRITTEN REASONS FOR JUDGMENT

This tort action came before the Court for trial on December 8, 1969 and on February 12, 1970. The plaintiff was severely and critically injured when he swerved his truck off the roadway to avoid hitting an automobile operated by Ronald Lloyd.

On March 4, 1967, at 4:30 P. M., Harrison J. Cheramie, Jr. was traveling in a southerly direction on Louisiana Highway 308 at approximately 40 to 45 miles per hour. He was driving a van truck which he used in connection with the operation of his laundry business. He was headed to the junction of Louisiana Highway 308 and the Cote Blanche Bridge. In that area Highway 308 generally follows the bayou. As he approached the junction of Highway 308 with the Cote Blanche Bridge, a 1964 Ford owned by Chester Lloyd and being operated by Ronald Lloyd crossed the Cote Blanche Bridge and failed to stop for traffic on Highway 308. Mr. Cheramie's vehicle turned over and he received injuries which caused him to become a quadriplegic.

The intersection had an inoperative flashing red light and a stop sign which was partially obscured by the bridge railing. Both the stop sign and the red light were directed toward traffic crossing the bridge attempting to enter Highway 308. The testimony showed that the State of Louisiana, Department of Highways, through its employees, was aware of the fact that the light was inoperative. As plaintiff approached the junction of Highway 308 with the Cote Blanche Bridge the vehicle driven by Lloyd suddenly

pulled into his path. Plaintiff was forced to choose between striking the other vehicle or causing his vehicle to leave the roadway in an effort to try to swerve and miss the automobile. He chose the latter, which at the time seemed the proper course. Unfortunately, when his van hit a small ditch adjacent to the roadway it turned over and plaintiff received the resultant injuries.

The Court finds that Mr. Cheramie was free of negligence. Although Lloyd, the other driver, testified that Cheramie's vehicle was moving at an excessive rate of speed, the Court disregards his testimony and believes the testimony of Cheramie and the other witnesses that Cheramie was traveling well under the speed limit at a reasonable rate.

The Court further finds that Ronald Lloyd was negligent in the maner in which he operated his motor vehicle. Although Lloyd testified that he crossed the Cote Blanche Bridge at a low rate of speed and stopped for the stop sign before entering Highway 308, attempting to turn left and travel in a northerly direction, the evidence, as this Court finds the facts, is to the contrary. Lloyd testified that he saw the stop sign when he was over halfway back towards the middle of the bridge. The evidence shows that it was impossible to see the sign until one is within 27 feet of the sign. This was because the sign was obscured by the railing of the bridge. Lloyd confessed his lack of familiarity with the intersection. He could not have seen the stop sign when he said he did. The evidence indicated that he was traveling across the bridge too fast and did not stop.

The Court concludes that the stop sign was not clearly visible for 250 feet as it should have been, that it was not properly placed, and that it was not properly maintained. The Court further finds that the Department of Highways is responsible

for the placement of the stop sign and breached its duty to the traveling public by not placing the stop sign in the proper place where it could have been seen. The Court further finds that the stop sign was placed in violation of the Department's own regulations, which state: "All locations for signs should be so selected that there is no obstruction to the line of sight between the sign and a point in adjacent lane of the pavement at least 250 feet in the direction of approaching cars."

The Court concludes from the testimony that the blinker light at the intersection was not working at the time of the accident, that it had been out a long time and that defendant had adequate notice at least 2 years before the accident that the light was out and failed to take reasonable steps to replace the flashing red light. The Court was very impressed with Trooper Guidry's testimony. He was frank and honest in testifying. The Court believes him to have been very sincere and thanks him for his cooperation in being the court's interpretator when Mrs. Danos testified.

From this the Court concludes that the Department of Highways is responsible for the inoperative flashing red light whether it was an unauthorized or authorized light.

The Court feels that the Highway Department had two duties regarding these traffic control devices. First, it should have maintained the flashing red light or removed it if it was unauthorized or unnecessary. R. S. 32:236. Even if the Highway Department did not put the flashing light up, it was their responsibility to maintain it, repair it, or removed it if unauthorized. Second, it should have had the stop sign located where it was clearly visible to those using the bridge approaching the intersection. Their regulations require that such signs be visible for at least 250 feet. Here the evidence showed the sign only

visible within 27 feet. Louisiana Department of Highways, Traffic and Planning Section; Louisiana Manual on Uniform Traffic Control Devices, Part 1. The breach of these two duties by their failure to properly maintain the signals created a foreseeable and unreasonable risk to traffic entering the intersection. Traffic control devices should warn drivers unfamiliar with the area of hazardous conditions. The combination of a flashing red light and a stop sign have a strong psychological impact on a great majority of drivers, even those who are reckless. Whether both the red light and stop sign were needed is amply demonstrated by the accident itself. However, whether, as the State urges, the stop sign alone was sufficient is not controlling because the Court finds as a matter of fact that the stop sign was so obscured as to be completely ineffective.

"Negligence is conduct which creates an unreasonable risk of harm or injury to others, the failure to use such care as is necessary to avoid danger which should and could have been anticipated." Spiers v. Consolidated Companies, 241 La. 1017, 132 So2d. 879; Larned v. Wallace, La. App. 3 Cir., 146 So2d. 434; 2 Harper & James, Law of Torts (1956), Sections 16.1 (p. 896), 16.9 (p.928); Prosser on Torts (2nd Ed. 1955), Section 30 (p. 119), 35 (p. 165); 2 Restatement of Torts (First), Section 282. Vidrine v. General Fire and Casualty, 168 So2d. 449, 453 (3rd Cir. 1964).

Consequently, this Court finds that the Highway Department was negligent in its failure to properly maintain and erect the two traffic control devices in question.

The issue then becomes whether or not the State of Louisiana through the Department of Highways is legally responsible to plaintiff for its negligence in view of Lloyd's negligence.

In Dixie Drive It Yourself v. American Beverage Co., 137

So2d. 298 at 305, the Supreme Court of Louisiana quoted the following from 38 AmJur, Negligence, Section 167, p. 841:

> "The general principle is that the violation of a statute or ordinance is not rendered remote as the cause of an injury by the intervention of another agency if the occurrence of the accident, in the manner in which it happened, was the very thing which the statute or ordinance was intended to prevent."

The Court goes on to say "There is no universal formula for the determination of legal cause . . . . It is clear that more than one legally responsible cause can, and frequently does, contribute to a vehicular collision. Negligent conduct is a cause in fact of harm if it was a substantial factor in bringing about that harm." 137 So2d. at 302. The Highway Department's negligent failure to properly erect and maintain the flashing light and stop sign and Lloyd's negligent operation of his vehicle joined to cause Cheramie's damage. In this Court's opinion Lloyd's negligence does not relieve the Highway Department of liability. "The mere possibility that the accident would have occurred despite the required precautions does not break the chain of causation." Dixie, Supra. at 304. "The inattention or confusion of motor vehicle drivers is not a highly extraordinary occurrence." Dixie, Supra. at 305-306. This approach taken in Dixie was reaffirmed by the Supreme Court in Pierre v. Allstate Insurance Company, 242 So2d. 821.

As Judge (now Justice) Tate wrote in Vidrine v. General Fire and Casualty, 168 So2d. 449 (3rd Cir. 1964), ". . . . a governmental authority charged with maintaining traffic control signals may be held liable for the negligent failure of its officers and employees to maintain such signals in proper working order. 40 C.J.S. Highways, Section 262 at p. 311; 60 C.J.S. Motor Vehicles, Section 176 at p. 518." 168 So2d. at 453. Thus, the

State of Louisiana, Department of Highways, must be cast in judgment for its negligence which was a proximate cause of the accident and resulting injuries to Harrison J. Cheramie, Jr.

In Vidrine, Supra, Judge Tate quote from the Dixie Drive It Yourself decision as follows:

> "As the opinion notes, the mere fact that injury also results from subsequent negligence of a careless or confused motorist does not insulate the first wrongdoer from liability to innocent victims, on a contention that the prior negligence is 'passive. The doctrine of passive negligence as stated in some of our jurisprudence 'places undue emphasis on the chronology of the negligent acts and omissions.' 137 So2d. 298. Where the purpose of a statutory or other duty is to safeguard the passage of vehicular traffic, the essence of the inquiry of proximate causation is whether the risk and harm encountered by the injured person fall within the scope of the intended purpose of the duty." 137 So2d. 304-305.

In Pierre v. Allstate Insurance Company, 242 So2d. 821 (1970), the Supreme Court of Louisiana was faced with a case strikingly similar to its earlier decision of Dixie Drive It Yourself v. American Beverage Co., Supra. In Pierre plaintiff brought his car to a stop to the rear of a parked and unattended car (defendant's car) which was left on the roadway blocking plaintiff's lane of travel. Subsequently a dump truck and its inattentive driver plowed into the rear of plaintiff's car, hurled him out of his car and ran over him killing him. Reaffirming the new policy it espoused in Dixie Drive It Yourself, the court held that the defendant's negligence was not merely a "remote" cause of the accident -- his negligence indeed set the stage for the accident because it created the precise risk of harm which subsequently was perfected into a needless traffic fatality which was entirely foreseeable.

The court stated:

> "Where causation in fact is a breach of a duty imposed to protect from the particular risk involved and this breach is an act negligent

per se, the mere fact that there is a later and intervening negligent actor who helped to create the particular risk involved will not absolve the first negligent actor from responsibility."

It further stated:

"The keys for the solution of the issue of responsibility when there is more than one cause-in-fact of damages are (1) a determination of the exact risk or risks anticipated by imposition of the legal duty which has been breached and, (2) the legal or policy considerations which grant excuses from certain consequences which follow an act of negligence. This requires, under the facts and the law of each case and the attendant exigencies, a jurisprudential determination which will implement and make effective our broad codal provisions concerning those who should respond in damages for their faults."

DAMAGES

This tragedy happened over four and a half years ago when the plaintiff was 32 years old. He is married and the father of three children. On the first day of trial in December, 1969, plaintiff and defendant stipulated that the past medical expenses as of that time were $31,474.88. The Court believes that Mr. Cheramie will probably live his normal life expectancy and that he will have tremendous future medical expenses. The Court finds that Mr. Cheramie has had and will have in the future recurrent expenses for daily medications of approximately $1,000 per year. He will also have expenses for surgical appliances such as hydraulic lifts, special beds, standing tables, braces and wheel chairs over his life expectancy. The Court believes that an award of $300 per year for these elements of damage would be proper.

Mr. Cheramie is completely helpless and needs someone to look after him. The Court was greatly impressed by Mrs. Cheramie in her honest, forthright and frank way of testifying and in her

love and devotion in caring for Mr. Cheramie. The Court believes that to allow Mr. Cheramie some assistance, if only the assistance of a practical nurse one-third of the day, would be of tremendous help, and, of course, a definite element of damage. The Court therefore feels that an award of $150,000 as estimated future (discounted) medical costs would be proper. It is very uncertain at this time whether or not Mr. Cheramie may continue to have various surgical procedures and hospitalizations throughout his lifetime.

The Court finds that Mr. Cheramie has a loss of wages of $10,000 per year; that he has lost $45,000 in past wages and will lose $10,000 per year for what would be the rest of his normal work life expectancy to age 65, or approximately 29 more years, or approximately $290,000. The Court believes that this figure should be discounted and the Court finds the discounted amount to be $134,979 for loss of future wages, or a total of $361,453.88 as total specials, past, present and future.

The Court was impressed with Mr. Cheramie's frankness and candor in court and believes that he is suffering a living death. The Court is of the opinion that this is the most tragic and horrible case that this Court has ever heard.

Mr. Cheramie is hopelessly quadriplegic with more than 90 percent of his spinal cord irreversibly and permanently severed. He will always be quadriplegic. For the pain and suffering, past, present and future, and for the permanent disability and residual disabilities and for his vegative existence, the Court awards judgment in favor of Mr. Cheramie and against the State of Louisiana, Department of Highways, in the total amount of $850,000. See Bush v. General Electric Corp., Nevada, Oct. 16, 1970, 13 ATL Newsletter 394-395, Nov. 1970; Talcott v. Holl, 224

So2d. 420 (1969) Florida; Davis v. Certified Life Ins. Co., Cal., May 13, 1971, No. 148431; Miller v. Chatham Board of Education, 7 NAACA Newsletter 219 (Aug. 1964); Ergas v. Barricini, 6 NAACA Newsletter 219, New York, Oct. 1963; Bleak v. City of Beverly Hills, 10 ATLA Newsletter 187, 219; Mason v. Waco Scaffold and Shoring Co., Florida, 18th Judicial Circuit, February 10, 1971, Brinegar v. San Ore Construction Co., 302 F. Supp. 630 (E. D. Ark. 1969); Beasley v. North Central Airlines, Illinois, Cook County Circuit, June 29, 1970, 13 ATL Newsletter 269.

Judgment is rendered in accordance with this opinion, and will be signed accordingly.

Baton Rouge, Louisiana, this 7th day of December, 1971.

JUDGE

FILED

DEC 7 1971

DEPUTY CLERK

NINETEENTH JUDICIAL DISTRICT COURT

PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

HARRISON J. CHERAMIE, JR.	:	NUMBER 130,070
VERSUS	:	NUMBER "C"
STATE OF LOUISIANA	:	JUDGMENT

This matter came on for trial on 8 December 1969 and 12 February 1970. Present in Court: Arthur Cobb and Max LaBranche, attorneys for plaintiff, and Charles William Roberts, attorney for defendant. The court, considering the law and the evidence to be in favor of plaintiff, for written reasons assigned:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of plaintiff, Harrison J. Cheramie, Jr., and against defendant, State of Louisiana, in the sum of $361,453.88 for total special damages and the sum of $850,000.00 for pain and suffering and permanent disability, past, present and future, with allowable interest and costs;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the expert witness fee of Dr. Dean Echols is fixed at $100 and taxed as costs.

JUDGMENT RENDERED on 7 December 1971.

JUDGMENT READ AND SIGNED at Baton Rouge, Louisiana, on 9 December 1971.

Donovan W. Parker

JUDGE, 19TH JUDICIAL DISTRICT COURT

FILED

DEC 9 1971

Camille Romano

DEPUTY CLERK

I hereby certify that on this day a notice of the above judgment was mailed, postage affixed, to: Clee. Wm. Roberts & A. Cobb

Done and signed on Dec. 9, 1971

Camille Romano

Deputy Clerk of Court

APPENDIX B

HARRISON J. CHERAMIE, JR.

VS.

STATE OF LOUISIANA

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 8884

APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT, PARISH OF EAST BATON ROUGE, HONORABLE DONOVAN W. PARKER, JUDGE PRESIDING

MAY 8 9 1972

BEFORE: LANDRY, BLANCHE AND TUCKER, JJ.

TUCKER, J.

The plaintiff, Harrison J. Cheramie, Jr., sued to recover damages for personal injuries, pain and suffering, residual impairment, medical expenses and loss of wages, arising from a vehicular accident, involving his 1965 model International panel truck and a 1964 model Ford car, owned by Chester Lloyd and being driven at the time by Ronald Lloyd. The accident occurred about 4:30 P.M. on March 4, 1967 at the intersection of a pontoon bridge and La. Rte. No. 308 in the Parish of Lafourche, on the north side of the town of Cut Off, La. The Lloyd vehicle traveled north on La. Rte. No. 1 on the west side of the bayou, then turned right, moving easterly across the bridge, preparatory to turning north on said La. No. 308.

Previous to the accident, Ronald Lloyd, accompanied by his father, Chester R. Lloyd, the owner of the Ford car, and Mr. and Mrs. Joe Wilson as passengers, had left their respective homes in Slidell, La. and driven south on State Rte. 1 on the west side of Bayou Lafourche to a restaurant which was a short distance south of the subject bridge. They were attracted to this place by a report that the oysters were good and inexpensive. After the group finished eating they started their trek back to Slidell, and apparently decided to proceed homeward on the east side of the bayou.

Ronald Lloyd, the operator of the Ford car, testified he saw what he recognized to be a stop sign warning traffic going easterly of the duty to stop when he was about the middle of the bridge. This structure was proved to be 220 feet in length. He also stated that the stop sign was partially obscured when he first saw it. The evidence is in conflict with respect to whether Lloyd came to a full and complete stop. Lloyd said he did so stop, and then attempted to move forward enough to avoid the impingement of his view north and south created by a utility pole. Other witnesses were just as certain that he did not come to a full stop. This is unimportant in view of the fact that Lloyd undisputedly drove the Ford car some distance into the plaintiff's lane of travel, thus substantially blocking Cheramie as he traveled south. In order to avoid a collision with the Ford car the plaintiff turned his panel truck to the left, drove over a small hump, and the truck turned over in the yard of a residence on the east side of Rte. No. 308, As a result of the accident plaintiff suffered grievous and grave physical injuries. He is paralyzed from the level of his shoulders down.

The trial court rendered judgment in favor of the plaintiff in the sum of $1,211,453.88 with legal interest and costs. From this judgment the defendant, State of Louisiana, has perfected this appeal.

The defendant contends here that the evidence does not show any act of commission or omission on the part of the Department of Highways, its adjunct, which had any causal connection with the accident.

The evidence justifies the determination of the trial court that the Lloyd vehicle did not come to a complete stop when the driver of same was confronted by the stop sign before reaching the intersection of the pontoon bridge and Rte. No. 308.

The lower court in rendering its judgment reasoned that Ronald Lloyd was incorrect in his testimony that he saw the stop sign apparently for the reason that it was so obscured by the utility pole or cross arm (then in an upright position) and used in the down position to warn motorists that the

bridge was open in order to accommodate bayou boat traffic). We do not agree with this crucial conclusion by the trial judge as we shall illustrate.

The plaintiff contends that not only was the defendant negligent in failing to properly maintain and position the stop sign, but, as well, there was a blinker or beacon light suspended over the subject intersection which had not been in operation for a substantial length of time previous to the accident with the actual or constructive knowledge of the Department of Highways that the light was not working. It was argued that the combination of these two factors indicted the defendant with actionable negligence which represented a cause in fact of the accident, and justified the judgment of the trial court. Plaintiff further points to the Department manual with respect to the duties imposed insofar as the maintenance of devices designed to warn the traveling public such as signs and "flashing beacons". These manual rules not only require such devices to be properly maintained so as to insure legibility and visibility, but state that a sign should be removed if no longer needed. In this regard it was stipulated that the blinker light fixture was installed by the Lafourche Parish Police Jury; that the Department never agreed to its installation, and had no record of the existence of the beacon light. Plaintiff urges the duty of the Department to remove or order the removal of unauthorized signs and other devices which are placed on highway property. Without doubt the Department had constructive knowledge of the inoperative beacon light.

The record shows that the stop sign was partially visible midway the bridge and wholly visible when a motorist on the bridge traveling east was 27 feet to the west of the sign. There was an added five feet of the bridge from the position of the sign to the eastern edge of the bridge and an additional 16 feet from that point to the west edge of the blacktop of Rte. 308. Consequently, Ronald Lloyd had a distance of 49 feet from the point on the bridge where he could see the complete stop sign until he reached the blacktop surface of the subject road. Of course, the precise point Lloyd had reached on the bridge, when he saw a sufficient portion of the sign to warn him that he should stop

at the intersection, is not so definitely fixed, but no witness refuted Lloyd's estimate that he saw the sign when he had reached about the middle of the bridge, which would have been a point approximately 110 feet from the eastern edge of the bridge.

Plaintiff argues that Ronald Lloyd was unfamiliar with the bridge, having never traversed it previously. Nonetheless, Ronald Lloyd says he did see the stop sign as he was crossing the bridge. No one contradicted this portion of his testimony and that of his father, Chester R. Lloyd. It is true that he had never crossed the bridge previously, but he says his father informed him that there was a highway on the east side of the bridge.

Plaintiff claims that Lloyd's testimony that he saw the stop sign sufficiently in advance of the intersection to stop the Ford car is suspect and unbelievable. In accounting for this premise plaintiff's counsel theorizes that the Lloyds were not disinterested witnesses in that they were desirous of absolving Ronald Lloyd from any responsibility for the severe injuries experienced by Cheramie in the accident. We are unable to decipher this reasoning, for it appears that the converse thesis would hold true. Certainly, the admission on the part of Ronald Lloyd and his father that they saw the stop sign was not calculated to relieve any guilt feeling which might have been harbored by Ronald Lloyd as a result of the accident.

The law and cases cited by the plaintiff with respect to the duty of the Department to place signs in locations where they will serve the purposes for which signs are intended have no application here for the plain reason that the intervening pole or cross arm did not reduce Lloyd's view of the sign to such an extent that he was unable to discern that it was a stop sign. As a matter of fact the testimony of the other witnesses and the photographic evidence soundly corroborates Lloyd's testimony that he saw the stop sign in ample time to bring his car to a complete halt before the inter-

section, and in view of this the court finds that a reasonbly observant, prudent and careful motorist would have had no difficulty in seeing the essential and substantive part of the sign with the resultant recognition of his duty to stop at the intersection. The trial court was correct in its finding that Lloyd was negligent in entering the intersection at a time when it was not safe for him to do so, but the lower court committed manifest error in holding that the defendant was negligent, and that such negligence was a causative factor in the occurrence of the accident. It is recognized that a stop sign is distinctive both in color and shape.

The facts of McCallum v. State, 246 So. 2nd 46 (La. App. 3d Cir. 1971) have no relation to the factual situation posed here. In the cited case the plaintiff was injured because the state negligently failed to provide a barricade or suitable warning device for motorists traveling toward a T-intersection on which the road on which the such a motorist was traveling suddenly terminated.

No material significance is placed by a reasonable, careful and prudent motorist with respect to the manner in which he drives his vehicle when he is confronted by an inoperative blinker light. The inoperative status of the beacon light was not established to be a causative factor in this case, and no bearing on the occurrence of this accident can be attached to a dead blinker light, especially in view of our holding that the testimony of Lloyd that he saw the stop sign was uncontradicted and supported by the photographic evidence. Since Lloyd did not stop or maintain his stopped position for a sufficient length of time to permit Cheramie to clear the intersection, there is no justification for holding that Lloyd would have given credence to a working blinker light.

The evidence in the record clearly reflects that Ronald Lloyd had ample and sufficient time to stop at the subject intersection, traveling at a speed of 10 to 15 miles per hour, whether he recognized the traffic control as a stop sign when he was 110 feet west of the east end of the bridge when he said he did, or that his recognition did not come into fruition until

he was 48 feet west from the western edge of the road blacktop.

The rule that the burden of proving his case rests upon the plaintiff is well accepted and does not require citation of authority. The plaintiff has fallen short of establishing his case.

The judgment of the trial court is reversed at plaintiff-appellee's costs.

REVERSED AND RENDERED.

APPENDIX C

COURT OF APPEALS, FIRST CIRCUIT, STATE OF LOUISIANA

Harrison J. Cheramie, Jr. — No. 8884

Parish of East Baton Rouge

vs.

State of Louisiana

On application for rehearing.

Rehearing REFUSED

Baton Rouge, Louisiana, JUN 26 1972, *19*

P. B. Landrieu, J.

C. Lester Edwards

Judges

Fred A. Blanchard, J.

Ben N. Tucker

Filed JUN 26 1972, *19*

Margaret B. Reese
Dy. Clerk

LAW OFFICES OF
ARTHUR COBB

27 JUN 1972

3101 DALRYMPLE DRIVE

APPENDIX D

Supreme Court of Louisiana

NEW ORLEANS, 70112

HARRISON J. CHERAMIE, JR. September 22, 1972

V.

STATE OF LOUISIAN A NO. 52,704

- - - - -

In re: Harrison J. Cheramie, Jr. applying for certiorari, or writ of review, to the Court of Appeal, First Circuit, Parish of East Baton Rouge.

- - - - -

Writ refused. On the facts found by the Court of Appeal we find no error of law in its judgment.

/s/ WBH

/s/ EHMcC

/s/ JWS

/s/ FWS

A TRUE COPY
Clerk's Office
Supreme Court of Louisiana
New Orleans
September 22, 1972

/s/ Andrew J. Falcon
Deputy Clerk

LAW OFFICES OF
ARTHUR COBB
25 SEP 1972
3101 DALRYMPLE DRIVE
BATON ROUGE, LA. 70802

APPENDIX E

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

COPY

Arthur Cobb, Esq.
3101 Dalrymple
Baton Rouge, La. 70802

RE: CHERAMIE v. LOUISIANA,
No. 72-913.

Dear Sir:

The Court today denied the petition for a writ of certiorari in the above-entitled case.

Very truly yours,

MICHAEL RODAK, JR., Clerk
By

Helen Taylor
Helen Taylor, (Mrs.)
Assistant Clerk

Charles W. Roberts, Esq.
Burton & Roberts
Suite 102, Benwing Bldg.
721 Government St.
Baton Rouge, La. 70802

APPENDIX F

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

MINUTE ENTRY:
OCTOBER 5, 1973
WEST, J.

HARRISON J. CHERAMIE, JR. — CIVIL ACTION

VERSUS — NUMBER 73-240

HONORABLE BEN N. TUCKER, ET AL

* * * * *

This matter is before the Court on plaintiff's motion for summary judgment; the motion of the defendant, State of Louisiana, to dismiss and for summary judgment; and on the motion of the defendants, Fred A. Blanche, Jr., Ben N. Tucker, and Paul B. Landry, Jr., all Judges on the Louisiana State Court of Appeals, to dismiss and for summary judgment. No oral argument is required on this motion.

The plaintiff in this matter originally filed a suit in the Nineteenth Judicial District Court for the Parish of East Baton Rouge, State of Louisiana, against the State of Louisiana, through the Department of Highways, for damages resulting from an automobile accident which occurred on March 4, 1967. As a result of that trial, the plaintiff was granted a judgment in the amount of $1,211,453.88. The Trial Court found the plaintiff free of negligence and found that the driver of the adverse vehicle was guilty of negligence proximately causing the accident. The defendants appealed from this judgment to the First Circuit Court of Appeals for the State of Louisiana, which was presided over by Judges Tucker, Blanche, and Landry. After hearing, that Court reversed the Trial Court's judgment and rendered judgment in favor of the defendants. Even though the defendant Judges

held that the Lower Court "committed manifest error," it is *obvious that the "manifest error" allegedly committed by the* Trial Judge resulted solely and entirely from the fact that he concluded, from the evidence which he had heard, that the plaintiff had proved his case by a preponderance of the evidence, and the Court of Appeals, hearing no witnesses but simply reading a cold record, concluded that the plaintiff had not so proved his case. Under Louisiana law appellate courts are authorized to review both the law and the facts, even though their review of the facts does not encompass seeing or hearing any witnesses. The constitutionality of this procedure, as it pertains to jury trials, was thoroughly litigated in several cases, the lead case of which was *Melancon v. McKeithen*, 345 F.Supp. 1025 (E.D. La. 1972 - Three Judge Court). In a two to one decision, the Louisiana procedure for reviewing both law and fact was held to be constitutional, and this decision was affirmed on appeal to the United States Supreme Court. Despite that decision the plaintiff here contends that this case is not governed by *Melancon*, and prays that the actions of the defendant Judges now be set aside and that the judgment of the Trial Court be reinstated.

As to the motion to dismiss filed by the State of Louisiana, there is no doubt but that that motion should be granted. Plaintiff seeks the jurisdiction of this Court under the provisions of 42 U.S.C. §1983 and 28 U.S.C. §1343(3). It is well settled that the State is not a "person" under Section 1983, and is therefore not liable under its provisions. *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473 (1961); *Williford v. People of California*, 352 F.2d 474 (CA 9 - 1965). Therefore,

IT IS ORDERED that the motion of the State of Louisiana to be dismissed as a defendant in this suit be, and it is hereby GRANTED, for failure to state a claim against the State of Louisiana upon which relief could be granted by this Court.

The motion of the defendant Judges to dismiss should also be granted. Contrary to the argument of the plaintiff, it is the opinion of this Court that the plaintiff's claim against these Judges is foreclosed by the decision in *Melancon v. McKeithen*, supra. The plaintiff cannot complain that he has not had the opportunity to present all of his constitutional arguments. After having his judgment reversed by the State Court of Appeals, the plaintiff sought a rehearing before that Court which was denied by the Court sitting en banc. Thereafter the plaintiff applied for writs to the Louisiana Supreme Court, which were denied on a finding of "no error of law." The plaintiff then filed a petition for a writ of review to the United States Supreme Court and in connection with that application, filed a brief urging all of the arguments which are now urged before this Court. His application for review was denied by the United States Supreme Court on February 20, 1973. He now asks this Court to reverse the State Court of Appeals, the State Supreme Court, and in effect, to reverse the Supreme Court of the United States.

The plaintiff argues that *Melancon* does not apply to this case because that case involved an attack on the Louisiana system of jury trials and review as being violative of the Seventh Amendment to the United States Constitution whereas in this case he is basing his claim on an alleged violation of civil rights under 42 U.S.C. §1983. This Court cannot agree with that contention. While the *Melancon* case did, primarily, deal with the right of jury trial under the Seventh Amendment to the United States Constitution, nevertheless, it is the opinion of this Court that the opinion in *Melancon* was sufficiently broad to cover claims made under Section 1983 which involves the right of the Appellate Courts in Louisiana to review questions of fact as well as questions of law. Even though this Court, sitting as a member of the Three Judge Court in *Melancon*, dissented in that opinion, it is

nevertheless bound by the majority opinion in that case. A fair reading of *Melancon* can leave no doubt but that under Louisiana law, the State Courts of Appeal have the right to substitute their judgment as to the facts in a case for the judgment of the Trial Judge.

While th holding in *Melancon* is sufficient reason to grant the defendant's motion to dismiss this case, it is the further opinion of this Court that Judges are immune from suits arising out of their judicial acts, and that the Civil Rights Statutes create no exception to that rule. See *Harris v. Louisiana State Supreme Court*, 334 F. Supp. 1289 (E.D. La. - 1971 - Three Judge Court.) For these reasons:

IT IS ORDERED that the plaintiff's motion for summary judgment be, and it is hereby DENIED, and,

IT IS FURTHER ORDERED that the motions of all of the defendants herein for summary judgment be, and they are hereby GRANTED, and this case is hereby DISMISSED in its entirety.

/s/ E. GORDON WEST
United States District Judge

APPENDIX G

Harrison J. CHERAMIE, Jr., Plaintiff-Appellant,

v.

Honorable Ben N. TUCKER, etc., et al., Defendants-Appellees.

No. 73-3944
Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

May 2, 1974.

Civil rights action against state appellate judges and state through its department of highways wherein plaintiff, in effect, contested constitutionality of decision of state appellate court. The United States District Court for the Middle District of Louisiana, E. Gordon West, J., entered judgment for defendants, and plaintiff appealed. The Court of Appeals, Gewin, Circuit Judge, held that department of highways was not "person" subject to suit and that judges were immune from suit.

Affirmed.

1. Civil Rights ⇐13.7

States, political subdivisions, and arms of state government such as department of highways are not "persons" who may be sued under federal civil rights law. 42 U.S.C.A. § 1983.

See publication Words and Phrases for other judicial constructions and definitions.

* Rule 18, 5th Cir. See Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al., 5th Cir. 1970, 431 F.2d 409.

Synopses, Syllabi and Key Number Classification
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INDEXED

2. **Civil Rights — 13.8(5)**

State appellate judges who reversed judgment for plaintiff in personal injury action were immune from suit under federal civil rights law. 42 U.S.C.A. § 1983.

3. **Judgment — 828(3.49)**

Federal court would not reexamine negligence issue litigated to judicial conclusion in state courts, on claim that state procedure authorizing appellate judges to review law and facts was unconstitutionally applied. 42 U.S.C.A. § 1983.

Appeal from the United States District Court for the Middle District of Louisiana.

Before GEWIN, GODBOLD and CLARK, Circuit Judges.

GEWIN, Circuit Judge:

The appellant, Harrison Cheramie, was severely injured in an automobile accident on March 4, 1967. He brought suit against the Louisiana Department of Highways in the state district court alleging that his injuries resulted from the Department's failure to erect and maintain two traffic control devices. On the facts as found by the trial judge he was awarded a judgment in excess of $1.2 million. Under Louisiana's system of appellate review of the facts as well as the law the Louisiana First Circuit Court of Appeal reversed and rendered judgment against the appellant finding that the factual findings of the trial court were manifestly erroneous.[1]

1. In Melancon v. McKeithen, 345 F.Supp. 1025 (E.D.La.), aff'd mem. sub nom. Hill v. McKeithen, 409 U.S. 943, 93 S.Ct. 290, 34 L.Ed.2d 214 (1972), a three-judge district court held that the Louisiana system of appellate review did not violate the due process clause of the Fourteenth Amendment. The court stated:

> The law of this state is unique. Nevertheless its lawmakers, legislative and judicial, have managed to work out compromise procedures compatible with Louisiana's civilian heritage and with the Anglo-American concept of due process. There is appellate review on the facts as well as the law, but it is subject to the requirement that factual findings of a trial court or the verdict of

After several unsuccessful attempts to reverse the appellate decision upon direct review the present action was filed in the federal court. Pursuant to 42 U.S.C. § 1983 the appellant asserts that by their action the appellate judges were "persons" depriving him of his due process rights under the Fourteenth Amendment. In addition to the three appellate judges the State of Louisiana was named as a defendant through its Department of Highways. The district court granted the judges' motion for summary judgment and the State's motion for dismissal. We affirm.

[1] It is well established that states and their political subdivisions are not "persons" within the meaning of 42 U.S.C. § 1983.[2] The same can be said of the various arms of state government such as the Department of Highways.[3] It is clear, therefore, that the motion to dismiss filed on behalf of the State of Louisiana through the Department of Highways was properly granted.

[2] The appellant, however, has also sued the three appellate judges individually and in their judicial capacity. Although suing the judges individually satisfies the "person" requirement of § 1983, it does not end the appellant's problems. Section 1983 does not affect the well established rule that judges are immune from damage suits arising out of the exercise of their judicial function.[4] Chief Justice Warren

a jury should be disturbed only when they are manifestly erroneous.

2. Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961); Williford v. People of California, 352 F.2d 474 (9th Cir. 1965).

3. Bennett v. People of California, 406 F.2d 36 (9th Cir. 1969) (inapplicable to the California Department of Corrections).

4. Pierson v. Ray, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967); Zuckerman v. Appellate Div., Supreme Court of New York, 421 F.2d 625, n.2 (2d Cir. 1970).

clearly enunciated the necessity for the judicial immunity doctrine. He stated:

> Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction, as this Court recognized when it adopted the doctrine, in Bradley v. Fisher, 13 Wall. 335, 20 L.Ed. 646 (1872). This immunity applies even when the judge is accused of acting maliciously and corruptly, and it "is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences." (Scott v. Stansfield, LR 3 Ex 220, 223 (1868) quoted in Bradley v. Fisher, supra, 349, note, at 350, 20 L.Ed. at 650.) It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation.[5]

While recognizing the judicial immunity to suits for damages the appellant contends that judges are susceptible to civil rights actions seeking equitable relief. The appellant does not seek damages from the judges. Rather he requests that this court hold their decision to be unconstitutional.

5. Pierson v. Ray, 386 U.S. 547, 553–554, 87 S.Ct. 1213, 1217–1218, 18 L.Ed.2d 288 (1967). The doctrine seems just as firmly entrenched in the civil law system of Louisiana as in the common law of which the Chief Justice spoke. In Killeen v. Boland, Gschwind Co., 157 La. 566, 102 So. 672, 675 (1925) the Louisiana Supreme Court stated that "[o]n the highest grounds of necessity and public policy judges cannot be held liable for acts done by them in their judicial capacity."

There is indeed some authority recognizing a distinction between suits for damages and suits for purely equitable relief.[6] Rarely in this line of cases, however, has there been any real interference with the discretionary functions of a judge.[7] In the instant case the requested relief would directly and irrebuttably interfere with a discretionary judicial function. Furthermore, it is far from clear that the relief appellant requests is equitable. He requests us to hold the state appellate decision unconstitutional, a measure which would presumably reinstate the judgment rendered in the trial court. In essence the appellant seeks reinstatement of a damage award against the State of Louisiana's Highway Department. This is a result not directly obtainable under § 1983.[8] While there is a judicial reluctance to see a result achieved indirectly which may not be achieved directly our decision need not be based on so narrow a ground.

[3] The substance of the appellant's claim is not the unconstitutionality of the Louisiana system but the alleged unconstitutional application of the system to his case. In essence he contends that the state court merely paid "lip service" to the doctrine of manifest error which is alleged to save the constitutionality of the Louisiana system.[9] To reach this issue it is necessary to re-examine the validity of the state court judgment. The state appellate decision is incorrect only if it was not manifestly erroneous for the trial court to find the

6. United States v. McLeod, 385 F.2d 734, 738 n.3 (5th Cir. 1967); Jacobson v. Schaefer, 441 F.2d 127, 130 (7th Cir. 1971); Koen v. Long, 302 F.Supp. 1383 (E.D.Mo.1969); Bramlett v. Peterson, 307 F.Supp. 1311, 1321–1322 (M.D.Fla.1969); Ashenhurst v. Carey, 351 F.Supp. 708 (N.D.Ill.1972); Bilick v. Dudley, 356 F.Supp. 945 (S.D.N.Y.1973). *See also* Littleton v. Berbling, 468 F.2d 389 (7th Cir. 1972), rev'd on other grounds sub nom. O'Shea v. Littleton, — U.S. —, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974).

7. This lack of interference often has been specifically recognized. *See* Bramlett v. Peterson, 307 F.Supp. 1311, 1322 (M.D.Fla.1969); and Bilick v. Dudley, 356 F.Supp. 945, 953 (S.D.N.Y.1973).

8. *See* text accompanying notes 2 and 3, *supra*.

9. *See* note 1, *supra*.

Department of Highways negligent in the maintenance of traffic control signals. This issue has already been litigated to a judicial conclusion and the doctrine of collateral estoppel, therefore, comes into view.

This court recently quoted with approval the following principle:

> "'It is a fundamental principle of jurisprudence that material facts or questions which were in issue in a former action, and were there admitted or judicially determined, are conclusively settled by a judgment rendered therein, and that such facts or questions become res judicata and may not again be litigated in a subsequent action between the same parties or their privies, regardless of the form the issues may take in the subsequent action, whether the subsequent action involves the same or a different form of proceeding, or whether the second action is upon the same or a different cause of action, subject matter, claim, or demand, as the earlier action. *In such cases, it is also immaterial that the two actions are based on different grounds, or tried on different theories, or instituted for different purposes, and seek different relief.* * * *'"[10] (Emphasis in original)

The appellant has had a full and fair opportunity to litigate the issue of the Highway Department's negligence. For this court to grant the appellant his requested relief it would be necessary to reexamine the negligence issue. This we decline to do. It does not appear to be appropriate under any theory

10. Parker v. McKeithen, 488 F.2d 553, 557-558 (5th Cir. 1974). Assuming that the parties to this federal action are not the same as those in the earlier state litigation or their privies, we note that this court has embraced the modern trend and has moved toward repudiation of the mutuality of estoppel rule. Rachal v. Hill, 435 F.2d 59, 61-62 (5th Cir. 1970). *See also* Blonder-Tongue Labs v. University of Illinois Foundation, 402 U.S. 313, 91 S.Ct. 1434, 28 L.Ed.2d 788 (1971); James Talcott, Inc. v. Allahabad Bank, Ltd., 444 F.2d 451, 461 (5th Cir. 1971); Seguros Tepeyac, S. A., Compania Mexicana v. Jernigan, 410 F.2d 718 (5th Cir.), cert. denied, 396 U.S. 905, 90 S.Ct. 219, 24 L.Ed.2d 181 (1969).

advanced by the appellant for this court to review the decision of the appellate courts of Louisiana in a negligence case.

The judgment of the district court is, therefore, affirmed.

Affirmed.

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 73-3944

HARRISON J. CHERAMIE, JR.,
Plaintiff-Appellant,

versus

HONORABLE BEN N. TUCKER,
Etc., ET AL,
Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Louisiana

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ON PETITION FOR REHEARING

(June 6, 1974)

Before GEWIN, GODBOLD and CLARK, Circuit Judges.
PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.